91-799

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

ROBERT DATTILO,

Petitioner,

vs.

ROBERT HOKE, Superintendent,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether petitioner was denied the right of effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution because of counsel's lack of reasonable professional preparation; because of counsel's lack of active representation at the suppression hearing and at trial; because of counsel's subornation of perjury; because of counsel's act of depriving petitioner of a favorable plea bargain; and by counsel's concealment and nondisclosure of counsel's prior record with the New York State Bar Association and evidence of similar undertakings of subornation of perjury with another client showing counsel's propensity to perform the same or similar acts with petitioner.

2. Whether petitioner was subjected to an invalid search and seizure contrary to the provisions of the Fourth and Fourteenth Amendments of the United States Constitution because of the failure of the police officers to obtain a search warrant prior to their forcible entry into petitioner's hotel room; and because of the forcible entry of the police officers into the aforesaid hotel room of petitioner.

3. Whether petitioner was subjected to cruel and unusual punishment contrary to the provisions of the Eighth and Fourteenth Amendments of the United States Constitution by being sentenced to a term of 15 years to life imprisonment for the possession of 6 plus ounces of cocaine.

PARTIES TO THE PROCEEDING

The petitioner is:

Robert Dattilo
Clinton Correctional Facility Annex
Box 367A
Dannemora, New York 12929

The respondent is:

Robert Hoke, Superintendent
c/o The Honorable William P. Barr
Acting Attorney General of the United States
U.S. Department of Justice
10th and Constitution Avenue, N.W.
Room 4400
Washington, D.C. 20530

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No.

In The

Supreme Court of the United States

October Term, 1991

ROBERT DATTILO,

Petitioner,

vs.

ROBERT HOKE, Superintendent,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

(1) Report-Recommendation of Magistrate Gustave J. DiBianco, United States District Court, Northern District of New York dated September 13, 1990 (Appendix E, 10a).

(2) Order of the Honorable Con. G. Cholakis, Judge, United States District Court, Northern District of New York dated January 28, 1991 (Appendix D, 8a).

(3) Memorandum and Decision Order of the Honorable Con. G. Cholakis, Judge, United States District Court, Northern District of New York dated March 27, 1991 (Appendix B, 4a).

(4) Mandate and Order of the United States Court of Appeals of the Second Circuit dismissing appeal of petitioner requesting issuance of Certificate of Probable Cause from the decision of the Honorable Con. G. Cholakis, Judge, United States District Court, Northern District of New York dated January 28, 1991 (Appendix A, 1a).

STATEMENT OF JURISDICTION

(1) *Jurisdictional Statement*: Petitioner's rights under the Sixth and Fourteenth Amendments were violated in that the petitioner was denied his right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution.

(2) *Date of Judgment or Decree Sought to be Reviewed:* Mandate and Order of the United States Court of Appeals of the Second Circuit dismissing appeal of petitioner requesting issuance of Certificate of Probable Cause from the decision of the Honorable Con. G. Cholakis, Judge, United States District Court, Northern District of New York dated January 28, 1991.

(3) *Statutory Provision Believed to Confer Jurisdiction in this Court to Review the Judgment or Decree by Writ of Certiorari:*

(A) Pursuant to Rule 13.1 of the Rules of the Supreme Court of the United States (as amended to July 1, 1991), this petition is filed within ninety (90) days of the date of denial of discretionary review.

(B) Pursuant to Rule 10 of the Rules of the Supreme Court of the United States (as amended to July 1, 1991), the jurisdiction of this Court is invoked insofar as

(a) the decision of the United States Court of Appeals for the Second Circuit is in conflict with the decision of the Court of Appeals for the Ninth Circuit, *United States v. Windsor*, 846 F.2d 1569 (9th Cir. 1988) and

(b) the judgment of the United States Court of Appeals for the Second Circuit in this matter, entered on August 14, 1991, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONSTITUTIONAL PROVISIONS

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Sixth Amendment of the United States Constitution provides, *inter alia*:

> In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.

The Eighth Amendment of the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment of the United States Constitution provides, *inter alia*:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The basis for federal jurisdiction in this case rests upon a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 by a person in state custody to the United States District Court, Northern District of New York, after the petitioner's conviction was entered in the County Court, Albany County, and an appeal was denied and judgment affirmed by the Supreme Court, Appellate Division, Third Department, and a further appeal was denied and judgment affirmed in the New York Court of Appeals, on petition under 28 U.S.C. § 2254 for writ of habeas corpus.

Petitioner Robert J. Dattilo (hereinafter referred to as "petitioner") was arrested in a Howard Johnson hotel room in Latham, New York on April 10, 1985 by two New York state police officers for criminal possession of a controlled substance (six ounces of cocaine) in the first degree. After a trial by jury petitioner was found guilty and sentenced for a term of fifteen years to life. From the time of his arrest on April 10, 1985 until

the present time, petitioner has been incarcerated.

Petitioner's first attorney, E. Stewart Jones (hereinafter referred to as "previous attorney Jones"), conducted a preliminary investigation of petitioner's case, possessed multiple photographs of the site of arrest, and obtained a preliminary plea bargain on behalf of the petitioner of four and one-half (4-1/2) years to life.

Shocked with the terms of the plea bargain, petitioner sought the advice and opinion of a second attorney, Armand R. Riccio (hereinafter referred to as "counsel") who, at their first meeting promised petitioner an acquittal if petitioner followed counsel's instructions. Counsel stated that four and one-half (4-1/2) years to life was insanity; that a man is ruined if he does four and one-half (4-1/2) years in prison; and that counsel could definitely get petitioner acquitted. Based upon the foregoing legal representations, petitioner retained counsel at a charge of $5,000. It is submitted at this point that counsel did not advise petitioner as to how petitioner's acquittal was to be accomplished.

On August 14, 1985, counsel again visited petitioner at the Albany County Jail. Counsel, in his own handwriting, took a detailed history from petitioner. At this time, counsel advised petitioner that "he [counsel] wasn't sure how he was going to do it but that he [counsel] was going to make up a story that would get me [petitioner] acquitted; that he [counsel] told me [petitioner] that if I [petitioner] did what he [counsel] said and acted like he [counsel] told me [petitioner] to act, that I [petitioner] would go home"; that the script for a defense would not be proposed until after the suppression hearing; that such script would be tailored to meet certain facts or circumstances that would develop at the suppression hearing; and that it was necessary to await the testimony at the suppression hearing before counsel could tell petitioner how he was expected to testify (N.T. 440-11 to 13).

At the suppression hearing, the State rested after presentation of its case. When addressed by the judge to proceed for the defense, counsel stated that the defense would not be calling any witnesses, presenting any evidence, or making any closing argument (N.T. S33). The court found against the petitioner. How could it do otherwise with no evidence to the contrary?

It is submitted at this point that, although counsel for the petitioner offered no opposing evidence at the suppression hearing, the evidence at trial was very clear to demonstrate that there was both a forcible entry under threat of a drawn weapon, and a search and seizure without a warrant when a warrant should have been required.

Reference is made at this point to an eight page history taken by the law offices of previous attorney Jones before counsel entered the case which preserved the original interview of previous attorney Jones' first meeting with petitioner (N.T. 440-141). The history notes reflect that two police officers knocked on petitioner's door and told petitioner to let the police officers in; that petitioner asked the police officers many times if they (the police officers) had a search warrant; that petitioner was informed by the police officers that they (the police officers) don't need a search warrant; that the police officers did not, in fact, have a search warrant; that the petitioner then opened the door; that the police officers entered petitioner's hotel room and looked around the room; that the police officers found a scale and a plastic bag allegedly containing seven and one-half (7-1/2) ounces of cocaine; that the police officers did not read petitioner his Miranda rights; that the scale was on a shelf in the closet and not in plain view; that the cocaine was in the phone book slot of the end table and not in plain view.

It is submitted that counsel neither used nor introduced into evidence any photographs which depicted the arrest scene, the

subject hotel room door, the fact that the police officer could not see into the room with the chain on the door, and that petitioner could see the police officer with his gun drawn; that Assistant Manager Howland used master keys of the hotel to unlock the access doors to the separate building where petitioner's room was located, allowing the police entry to the common area shared by the motel room residents; that the Assistant Manager's use of these keys was in violation of the special security procedure used to assure the privacy of the residents; that counsel neither called Assistant Manager Howland as a witness nor interviewed him to obtain a precise definition of all the facts involving the police officers' approach to the room, drawing of weapons, and entry into the room (N.T. T214); that counsel neither called Officer Cook, the accompanying police officer, as a witness nor interviewed him (Officer Cook) to obtain the facts surrounding his admission to drawing his weapon prior to entry of petitioner's hotel room door; that counsel did not raise the defense of forcible entry or entry without a search warrant, especially in view of the facts that when petitioner answered the door he stated that there was no problem, the police officers nonetheless insisted on entry without a search warrant, and when asked for a search warrant petitioner was advised that no search warrant was required; that counsel made no inquiry of previous attorney Jones as to the content of his file, or if counsel had in fact received the file, did not use it; that counsel made no investigation to determine the exact content of the anonymous phone call to the police from the officer who received it; that counsel made no examination as to whether the anonymous phone call conversation was recorded; and that counsel made no investigation to determine why the phone recording equipment at the police station was not properly functioning; that counsel conducted no investigations or interviews prior to and in preparation of the suppression hearing, including but not limited to no legal research, plan, or theories; and that counsel presented neither a case for the defense nor any closing arguments on behalf of petitioner (N.T. S33).

It is submitted that due to the above failures by counsel to provide any semblance of a defense or strategy for petitioner at the suppression hearing, the suppression motion was denied by the court. The court was forced to conclude, on the basis that no contrary facts were presented by petitioner's counsel although a plethora of contrary facts existed, that the police officers were able to see into petitioner's room, the petitioner opened the door in the absence of any threats or coercion of the police officers, and the drugs were in plain view once the police officers entered petitioner's room.

It is submitted that, because counsel's behavior at the suppression hearing had deprived petitioner of a proper and an effective suppression defense of the illegal search and seizure of petitioner's hotel room, counsel's intention was to fabricate a defense of duress at trial in order to salvage petitioner's case. Further, and in support of counsel's concocted strategy, counsel planned to have petitioner testify at trial that petitioner made the telephone call and that the call was not made from an anonymous person.

Although counsel admits that he (counsel) received petitioner's case file from either previous attorney Jones or petitioner (N.T. 440-98 to 99); counsel denies that the file contained either petitioner's four (4) page written statement of the incident (N.T. 440-110, 101), or previous attorney Jones' eight (8) page written statement of the incident (N.T. 440-90), neither of which refers to petitioner's having been the party responsible for the telephone call and, thus, the duress defense.

At trial, petitioner was convicted, despite his claim of duress, of criminal possession of a controlled substance in the first degree. Petitioner is currently serving a prison term of fifteen years to life.

After trial, the court held a hearing on petitioner's motion

to vacate (hereinafter referred to as the "440 hearing"), the purpose of which was to investigate whether counsel was inadequate, incompetent, and ineffective at both the suppression hearing and at trial. The court understood the thrust of the motion to be that counsel caused petitioner to render fabricated testimony (N.T. 440-136 to 137, 139). It is submitted that the 440 court was not presented with the issue of ineffectiveness of counsel at the suppression hearing or trial.

It is submitted that petitioner testified that counsel had informed petitioner that petitioner would have to lie on the stand to support counsel's manufactured duress defense; that petitioner's wife testified that counsel had told her (petitioner's wife) at their meeting at counsel's office with petitioner's mother-in-law that counsel told her (petitioner's wife) that petitioner would have to lie in his defense; that petitioner's mother-in-law testified that counsel had told both her (petitioner's mother-in-law) and petitioner's wife that petitioner would have to lie on the stand (N.T. 440-30 to 37).

It is submitted that petitioner's mother-in-law further testified that counsel went to the hotel where petitioner was arrested and made a diagram of where a phone was situated and that petitioner was "damned lucky" he had done so; that the purpose of the diagram was to establish the position of the phone so that petitioner could testify to the place where he made the phone call (N.T. 440-34 to 35); and that, when petitioner incorrectly answered the telephone question at trial because the prosecutor waived some papers, counsel became irate with petitioner because petitioner had deviated from the script.

It is submitted that, although counsel admits to the authenticity of a written notation made on the day that counsel was visited by petitioner's mother and mother-in-law and revealing that he (counsel) would engage in various activities including

"seeing which available defense may fit the factual scenario present" (N.T. 440-110), counsel denied all of the testimony of petitioner, petitioner's wife, and petitioner's mother-in-law alleging that counsel had fabricated both the duress defense and had suborned perjury to support that duress defense.

It is submitted that although counsel stated that he (counsel) allegedly told petitioner numerous times after the suppression hearing to consider taking the initial plea bargain, counsel did not make any requests of the prosecuting attorney or any other person involved in the judicial system in this case to renew the plea bargain. It is clear that counsel continued the trial to the detriment of petitioner without making any effort of resuscitating the prior plea bargain of four and one-half (4-1/2) years to life.

In his defense at the 440 hearing, counsel states that petitioner allegedly stated after the suppression hearing that the prior history given by petitioner to both counsel and Attorney Jones' office was inaccurate; that petitioner had come to Albany pursuant to a threat made on his brother and to help his brother; and that petitioner was placed in a situation where petitioner was being framed and was in fear of his life and consequently called the police.

Reference is made at this point to a factually similar case, *People v. Avery*, 513 N.Y.S. 2d 883 (A.D. Third Dept. 1987), in which counsel in the instant case had been previously involved and had also shifted to a "duress" defense midway through the proceedings and had advised the client as to the facts to which client was to testify.

It is submitted, in corroboration to the above referenced *Avery* matter and counsel's denial in the instant case of his subornation of the false duress defense, that counsel was cross-examined as to whether this defense fact pattern of duress had

a familiar ring to it and counsel stated that he (counsel) knew that reference was being made to *Avery* matter (N.T. 440-115 to 116).

It is further submitted in corroboration to the fact that counsel was responsible for the subornation of the false duress defense that, although counsel's clerk Richard Henness (hereinafter referred to as "counsel's clerk"), stated that he (counsel's clerk) was present at the meeting of petitioner and counsel after the suppression hearing (N.T. 440-175), he (counsel's clerk) stated that he (counsel's clerk) did not remember hearing petitioner say to counsel after the suppression hearing "[w]ell, after this is all over, I'll tell you what really happened" (N.T. 440-156 to 158, 162, 177), as counsel alleges that petitioner said.

It is further submitted in corroboration to the fact that counsel was responsible for the subornation of the false duress defense, that counsel did not advise petitioner that testimony of the brother is needed in order to support the defense of "duress;" that the "duress" defense will fail if not corroborated by the testimony of petitioner's brother; that petitioner did not inquire of petitioner's mother, with whom petitioner's brother was residing, of the existence of the brother or the possibility of meeting with the brother.

During petitioner's trial counsel stated in open court that it is quite clear that the jury dislikes counsel intensely; that counsel stated in open court that counsel feels like he is being baited; that counsel stated in open court that the jurors will judge the petitioner on the fact that counsel is a blabbermouth and not on the merits of the case; that counsel stated in open court that the jurors would follow the judge to hell and back; and that counsel stated in open court that, to the jurors, the judge is the commander. It is clear that counsel at trial depreciated his ability,

presentment and appearance to the jury all to the detriment of petitioner.

The foregoing factual history indicates that petitioner's counsel was ineffective in the preparation of petitioner's case and in the representation of the petitioner at the suppression hearing, and in the defense of petitioner at trial.

REASONS FOR GRANTING THE WRIT

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

The standards by which effective assistance of counsel are to be determined have been set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In accordance with these standards, the *Strickland* Court provided that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, *supra*, at 686. *Strickland* has also provided that there are two components to the test used to establish that counsel's assistance was defective to the extent that a reversal of the underlying decision is required. The first prong relates to counsel's performance and the second prong evaluates the harm or prejudice suffered by the defendant. Unless the defendant makes both showings of the *Strickland* inquiry, it cannot be said that the defendant's conviction resulted from a breakdown of the adversarial process that renders the result unreliable.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

The first step of the *Strickland* inquiry provides that the defendant must show that the counsel's performance was deficient.

The petitioner avers that the following acts or omissions of counsel constitute his ineffective representation and unreasonable professional conduct.

A. No Reasonable Preparation

Petitioner alleges that counsel failed to reasonably prepare insofar as counsel failed to conduct a proper investigation of witnesses who would have corroborated petitioner's claim that the police forced themselves into petitioner's hotel room. It is the position of the petitioner that nowhere does counsel give any statement or render any account of his preparation of this case at either the suppression hearing or the trial except to draw the diagram of the site of the phone; that counsel did not use photographs which were obtained by an investigator for previous attorney Jones reflecting that when the door was opened but chained no view existed into the room and that the position of the police officer with the drawn gun would be in view of the defendant as he looked through the small opening; that counsel made no investigation of the facts and circumstances surrounding the arrest of the defendant prior to the suppression hearing to determine whether or not there was an unlawful search and seizure; that counsel either had in his possession and did not read it or should have had it in his possession by reasonable inquiry, the eight page history taken by the office of previous attorney Jones indicating a forcible entry and unlawful search and seizure; that counsel failed to investigate the content of the phone call that the police officers received; that counsel did not investigate the operational state of the telephone recording equipment that should have recorded the alleged anonymous telephone call.

B. No Active Representation at the Suppression Hearing

Petitioner challenges the effectiveness of his representation at the suppression hearing on numerous grounds. Petitioner's first

contention is that counsel failed to explicate the blatant discrepancies in the testimony of the police officers.

Officer Wilson testified, both on direct and re-direct examination at both the suppression hearing and at trial, that he was informed by fellow Officer Conway that Officer Conway had received a telephone call from an unknown male informant who stated that petitioner was staying at the Howard Johnson Hotel in Latham; that there was a condition that existed requiring immediate investigation; that there was going to be a problem at that location; that drugs were involved; that petitioner was in possession of cocaine; that Officer Wilson went to the Howard Johnson Hotel and informed Assistant Manager Howland of the aforesaid situation; that he Officer Wilson then proceeded, accompanied by Officer Cook and Assistant Manager Howland, to petitioner's hotel room; that Assistant Manager Howland stayed back approximately 50 feet from petitioner's hotel room door; that he (Officer Wilson) and accompanying Officer Cook knocked on petitioner's hotel room door; that petitioner answered the door; that petitioner opened the door approximately six to eight inches, the opening being limited to a chain appended to it; that he (Officer Wilson) identified himself to petitioner; that he (Officer Wilson) recited the nature of the call to petitioner; that he (Officer Wilson) did not force his way into petitioner's room; that his (Officer Wilson's) initial concern was whether any danger was involved to anyone in the hotel room including petitioner; that petitioner then opened the hotel room door completely; that he (Officer Wilson) was given access to petitioner's hotel room without any trouble; that petitioner made no effort to prevent him (Officer Wilson) from entering the room (N.T. S5-6, 8, 19, 33, 29-30; N.T. T75-76, 112-114); that, after petitioner opened the door, Officer Wilson observed in plain view a triple beam scale at eye level on the shelf (N.T. S9, 10, 15, 27-28); and a strainer and several small ZIP-LOC Bags on top of a dresser (N.T. S11). Officer Wilson then concluded that, based upon the anonymous phone

call, his observations of the drug paraphernalia, and his experience and familiarity with drug paraphernalia, there may have been another person in the room which posed a safety issue for both him and petitioner (N.T. S12-13). Due to Officer Wilson's aforesaid belief, he moved further in the room and observed in plain view a 12-inch by 12-inch Baggie containing what appeared to be a substantial amount of white powder and what, based upon his (Officer Wilson's) experience, he concluded to be cocaine. Due to his conclusion, Officer Wilson seized the bag containing the white powder and placed petitioner under arrest (N.T. S19).

On cross-examination, Officer Wilson testified that he (Officer Wilson) had not had a search warrant at the time that he (Officer Wilson) entered petitioner's hotel room; that he (Officer Wilson) had no recollection of whether he (Officer Wilson) had drawn his gun; and that he (Officer Wilson) had no recollection of whether accompanying Officer Cook had drawn his gun (N.T. S23).

It is submitted at this point that, due to the above testimony of Officer Wilson, that the officers did not have a search warrant; that one or both of the officers had their guns drawn; that Officer Wilson saw nothing when the door was first opened with the chain fastened to it; and that Officer Wilson's first full view of the room and the scale occurred only after petitioner had opened the door fully (N.T. T76).

Petitioner asserts that counsel failed to introduce any evidence for the defense in support of a suppression. Counsel for the petitioner merely cross-examined Police Officer Wilson and gave the petitioner no chance for suppression for failure to investigate and introduce evidence in support of suppression and unlawful search and seizure which was clearly available. The investigation and the evidence that were available are that counsel took a "sit back and wait attitude" toward the suppression hearing in order

to hear the police officer's testimony and then concoct a defense; that petitioner alleges that counsel failed to offer the neutral testimony of the hotel's Assistant Manager Howland who was 50 feet away from the incident and testified at trial that he (Assistant Manager Howland) saw the police officer draw his gun and could have so testified at the suppression hearing.

A comparison of the abundance of testimony from subsequent proceedings of Officer Cook, Assistant Manager Howland, and petitioner reveals that, in a dramatically different scenario than that presented by Officer Wilson, the police officers circumvented special security procedures to gain entry into a private area; that the police officers commanded petitioner to open the hotel room door; and that the police officers entered petitioner's hotel room with force and without hesitation (N.T. T215).

Petitioner further avers that counsel failed to allow petitioner to testify in his defense at the suppression hearing that petitioner was not advised of his Miranda rights; that petitioner made repeated inquiries for a warrant and was advised by the police officers that no search warrant was necessary; that petitioner would have narrated with particularity the threats that were made to him by the police officers both verbal and physical with respect to the drawn weapon; that the drug paraphernalia and drugs were not in open view and could not be seen from outside the room, and that he stated to the police officer that there was no trouble in the room but that the police officer forced his way into the room by threats both verbal and physical with a drawn weapon.

C. Counsel's Subornation of Perjury

Petitioner asserts that counsel forced petitioner to concoct false testimony and suborn perjury at trial in that petitioner's statement to previous attorney Jones makes no reference to duress; that petitioner, petitioner's wife, petitioner's mother-in-law testified

that counsel did in fact state that petitioner would have to lie at trial; that petitioner's mother-in-law stated that counsel became angry with petitioner when petitioner incorrectly answered questions concerning the telephone call; that counsel's clerk, who was present at the meeting of counsel and petitioner following the suppression hearing when the defense of duress first surfaced, stated that he (counsel's clerk) did not recall petitioner confessing circumstances concerning the defense of duress to counsel; that counsel did not advise petitioner that the "duress" defense would fail if not corroborated by the testimony of petitioner's brother; that petitioner did not inquire of petitioner's mother, with whom petitioner's brother was residing, of the location of the brother or the possibility of meeting with the brother in order to substantiate petitioner's version of the defense duress; and that counsel had previously been involved in a case in which he (counsel) had also shifted to a "duress" defense midway through the proceedings and had advised the client as to the facts to which client was to testify, thereby suborning perjury in another similar proceeding.

D. Depriving Petitioner Of Favorable Plea Bargain

Petitioner contends that counsel's handling of petitioner's case bereaved petitioner of a prior favorable plea bargain in that counsel initially represented to petitioner that the original plea bargain obtained by previous attorney Jones was ludicrous; that counsel advised petitioner not to take the original plea bargain obtained by previous attorney Jones because counsel would be able to get petitioner acquitted of the charges; and that counsel made no requests of the prosecuting attorney or any other person involved in the judicial system in this case to renew the plea bargain when petitioner's fate turned bleak at trial despite repeated requests by petitioner to do so.

E. Prior Disciplinary Sanctions

Petitioner further alleges that counsel's assistance was ineffective in that petitioner should have been made aware of counsel's prior disciplinary history.

Counsel's disciplinary history reveals that in *In the Matter of Armand R. Riccio v. New York State Bar Association, Petitioner*, 391 N.Y.S. 2d 199 (1977), counsel in the present case, Armand R. Riccio, was admonished for neglect of a client's personal injury case, where it was found that counsel failed to repay the sum of two thousand dollars ($2,000.00) to a client as promised; that counsel neglected an action for divorce; that counsel neglected a personal injury matter; that counsel failed to pay a medical bill for a client in the amount of one hundred dollars ($100.00) which he had promised to do, failed to satisfy a judgment in the sum of five hundred dollars ($500.00) which a former client obtained for recovery of a retainer paid to him, neglected a personal injury matter and failed to cooperate with the Committee on Grievances concerning numerous complaints filed against him.

Counsel's disciplinary history further reveals that in *In the Matter of Armand R. Riccio, an Attorney, Respondent v. Committee on Professional Standards, Third Judicial Department (Petitioner)*, 426 N.Y.S. 2d 887 (1980) counsel in the present case, Armand R. Riccio, he was suspended from the practice of the law for three years in 1980 where the Supreme Court, Appellate Division, was found that counsel in the present case, Armand Riccio, failed to appear in Justice Court on a date for trial of which he was specifically advised resulting in his client being arrested; that counsel stated that he "completely overlooked" that part of the court's letter which specified the trial date; that counsel failed to timely file a personal injury action resulting in the claim being barred; that counsel neglected a divorce action; that counsel misled and deceived a client by informing the client the case's

proceedings when in fact counsel had again failed to timely file the claim; that counsel failed to file a registration statement and pay a fee as required by judiciary law; that counsel was negligent in handling the defense of a client with respect to certain criminal charges, and failed to make pretrial motions; that counsel took a fee and agreed to represent the client on a probation violation charge and also on an appeal from the prior conviction and initially assured both the client and the client's wife that release on bail would be effected within three days; that counsel in fact made no bail application until a month later at which time it was denied; and that counsel took no steps to pursue the appeal.

Counsel's disciplinary history further reveals that, in 1984, he received a letter of caution for failing to cooperate with the Committee on Professional Standards in its investigation of an inquiry and again, in 1985, received a letter of admonishment for similar misconduct.

People v. Avery, 513 N.Y.S. 2d 883 (A.D. 3rd Dept. 1987), a case that shares with the instant case the same counsel and the same behavior of that counsel, is submitted at this point to again illustrate that, again as in the instant case, that counsel did not participate in pretrial proceedings to discover or suppress evidence alleged to be illegally obtained; that client was offered a plea bargain and advised by counsel to deny it; that counsel failed to investigate and discuss with the client the underlying facts of the case; failed to present a theory of defense to the client; that counsel shifted to the "duress" defense midway through the proceedings as in the present case; that counsel advised client of facts based upon the "duress" scenario to which client was to testify; that counsel further advised client that giving false testimony was a correct and accepted practice; that client received a longer sentence as a result of counsel's representations.

The above abundant failures illustrate counsel's deficient

performance in the instant case. It is incomprehensible to any rational mind that petitioner's defense was not prejudiced.

The second step of the *Strickland* inquiry requires the defendant to show that counsel's deficient performance prejudiced the defense. This burden requires the showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. In the present case, counsel's professional performance surrounding the suppression hearing fell below an objective reasonableness standard. This deficient performance led to petitioner being prejudiced by the result of the suppression hearing.

An examination of the record clearly reveals, in accordance with *Strickland's* second prong of the prejudice suffered, the merit of petitioner's Fourth Amendment claim and the reasonable probability that the verdict would have been different without the excludable evidence. In defining the standard used to measure "a reasonable probability," the *Strickland* Court stated that "[a] reasonable probability is a probability to undermine [the] confidence in the outcome." *Id.*

Accordingly, it is certainly reasonably probable that with the evidence of a forced entry threats and the brandishing of a weapon substantiated by a witness 50 feet away, counsel's failure to introduce evidence to justify the requirement that the police officers obtain a warrant, counsel's failure to illustrate the unlawful search and seizure resulting from the forcible entry, counsel's failure to use photographed evidence in the file depicting the position of the police officer with the drawn weapon, counsel's failure to subpoena the essential witnesses or introduce any evidence including but not limited to the testimony of the defendant who wanted to testify, counsel's failure to exploit the provided photographs to show the inability of the police officers to see into petitioner's hotel room with the chain attached to the door,

counsel's failure to investigate the content of the anonymous phone call, counsel's failure to interview the police officer who received the anonymous phone call, counsel's failure to examine the status of the broken phone call recording equipment and the police station, counsel's failure to plan any legitimate strategy at the suppression hearing or at the trial, counsel's failure to present any evidence at the suppression hearing, counsel's failure to exploit the discrepancies in the testimony of the police officers, counsel's failure to examine the neutral testimony of Assistant Manager Howland, counsel's failure to allow petitioner to take the stand in his own defense, counsel's subornation of perjury, counsel's failure in not rehabilitating the prior plea bargain, and the prior disciplinary actions against counsel resulted in a blatant fundamental unfairness to the petitioner, *Strickland*, at 699, and constituted a probability more than sufficient to undermine confidence in the outcome of the proceedings at the suppression hearing and later at the trial.

Therefore it is within the Court's power to review the entire record to the extent that the petitioner did not receive a full, fair, and adequate representation as guaranteed by the Constitution of the United States of America.

II. ILLEGAL SEARCH AND SEIZURE

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., Amend. 4. It is well settled law that evidence obtained in violation of the Fourth Amendment is inadmissible in both state and federal criminal prosecution. *Mapp v. Ohio*, 367 U.S. 643 (1961).

A. The Warrant Requirement

Generally speaking, to satisfy the requirements of the Fourth Amendment the government must establish that probable cause exists for the issuance of the search warrant. In *United States v. Bush*, 647 F.2d 357 (1981), the United States Court of Appeals for the Third Circuit stated that

> [t]he decision whether probable cause exists should be made by a "neutral and detached magistrate," not by those "engaged in the often competitive business of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948). See *Whiteley v. Warden*, 401 U.S. 560, 564, 91 S.Ct. 1031, 1034, 28 L.Ed.2d 306 (1971). To ensure that it is the magistrate who decides whether probable cause exists, an affidavit must contain the factual basis for the finding of probable cause, not merely "the unsupported assertion or belief of the officer." *Spinelli v. United States*, 393 U.S. 410, 423-24, 89 S.Ct. 584, 592-93 (White J., concurring); 21 L.Ed.2d. 637 (1969); *Nathanson v. United States*, 290 U.S. 41, 47, 54 S.Ct. 11, 13, 78 L.Ed. 159 (1933).

Id., at 362.

The anonymous phone tip did not establish probable cause. In the State of New York, an informant and his information must be evaluated by *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969). In accordance with the mandate of the rules of *Aguilar* and *Spinelli*, the court in *People v. Johnson*, 497 N.Y.S. 2d 618 (1985), stated that

> before probable cause based on hearsay is found

> it must appear, in the language of *Aguilar-Spinelli* rules that the informant has some basis of knowledge for the information he transmitted to police and that the information is reliable[.] . . . The basis of the informant's knowledge must be demonstrated because the information related by an informant, even a reliable one, is of little probative value if he does not have knowledge of the events he describes[.]

Johnson, *supra*, at 621.

The anonymous caller did not demonstrate a basis of knowledge or reliability. He provided no details, no "inside information," only a few vague words about a so-called "drug situation." The reliability of this informant could not be evaluated because he was anonymous with no established "track record" or past performance as a supplier of good information.

B. Exceptions to the Warrant Requirement

Although warrantless search and seizures are per se unconstitutional and the evidence seized inadmissible, the Supreme Court has carved out certain exceptions to the warrant requirement of the Fourth Amendment. The exceptions consist of consent searches, searches conducted pursuant to items observed in plain view, and searches conducted pursuant to exigent circumstances.

1. Consent

The first exception to the Fourth Amendment's warrant requirement concerns searches conducted pursuant to consent. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). This exception negates the need for both a search warrant and probable cause to conduct the search. The United States Supreme Court in

Schneckloth held that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. *Schneckloth, supra*, at 249. The Court further stated that voluntariness is a question of fact to be determined from all of the circumstances and that the subject's knowledge of a right to refuse is a factor to be taken into account. *Schneckloth, supra*, at 249.

At the suppression hearing, the State's main contention was that petitioner allegedly consented to the search of his hotel room. However, as the *Schneckloth* Court aptly states, consent cannot be voluntarily given if it is a result of duress or coercion, express or implied. *Schneckloth, supra*, at 249. Petitioner's consent was not given voluntarily as demonstrated by *United States v. Winsor*, 846 F.2d 1569 (9th Cir. 1988) and *United States v. Ester*, 442 F. Supp. 736 (S.D.N.Y. 1977).

In *United States v. Winsor*, 846 F.2d 1569 (1988), a police officer saw the suspect run out of a bank and into a nearby hotel. The police decided to enter the hotel and go from room to room looking for the suspect. At each room the police officers, with their guns drawn, knocked on the door and announced, "Police! Open the door." After many failed attempts, the officers finally arrived at the room where the suspect was located. When the police knocked on the door and demanded that it be opened, the suspect acquiesced and the police recognized him as the bank robber. The *Winsor* court, after reviewing the history of the leading cases on search, seizure, and probable cause, concluded that

> [t]he threshold question we must decide is whether the police conducted a search within the purview of the Fourth Amendment when they looked into

> [the suspect's] room through the open door while standing in the hotel corridor . . . In sum, we hold that the police did effect a "search" when they gained visual entry into the room through the door that was opened at their command.

Id., at 1573.

Petitioner's testimony is and certainly would have been at the suppression hearing as evidenced by the eight page history statement taken by previous attorney Jones' office that obscene threatening remarks were made to him accompanied by gestures of drawing weapons and a drawn weapon commanding him to open the latched hotel door. Being so threatened, he complied for fear of great bodily harm or death. Such behavior by the police officers is illegal and the very type of conduct which the United States Constitution and related judicial decisions were intended to correct. We do not live in a police state. As in *Winsor*, petitioner did not voluntarily consent to the police search of his hotel room by complying with the police threats and opening his hotel room door. Both the threats and the drawn weapons suggested to petitioner that the police had lawful authority and did not establish consent as a matter of law. *Winsor, supra*, at 1573, n.3.

It is further submitted that a "hotel proprietor cannot waive his guests' Fourth Amendment rights." *Winsor, supra*, at 1571. Accordingly, the presence of the police officers in the building outside petitioner's hotel room is a serious question in need of this Court's review, and a determination that the police officers were in the building in violation of petitioner's Fourth Amendment right will render the search of petitioner's room and the seizure of drugs as the "fruits of the poisonous tree."

In *People v. Lott*, 102 A.2d 506 (1954), the Supreme Court Appellate Division, Fourth Department of New York stated that

> while lobbies, hallways, and stairways where strangers are allowed unlimited access have been considered public places, a hallway located in a building and their guests, with locked front door insuring this security, has been held within the defendant's dwelling. *People v. McCurdy*, 86 A.2d 493. Here, the proof is clear that the entrancce to the front door of defendant's rooming house was locked. Under these circumstances, we view the stairway and hallway outside defendant's room as part of defendant's home where his right to be secure shall not be violated.

Id.

Accordingly, the use of the master keys by Assistant Manager Howland to unlock the access dorrs and allow the police officers entry to the separate building where petitioner's room was located violated the special security procedure used to assure the privacy of petitioner.

2. Plain View

The second exception to the warrant requirement involves situations in which a police officer has seized evidence in plain view. *Texas v. Brown*, 460 U.S. 731 (1983); *Collidge v. New Hampshire*, 403 U.S. 443 (1971). For the plain-view doctrine to apply, not only must the officer be legitimately in a position to view the object, but it must be immediately apparent to the police that they have evidence before them. *Brown*, *supra*, at 739. This is because "[t]he seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is no probable cause to associate the property with criminal activity." *Brown*, *supra* 742 (quoting *Payton v. New York*, 445 U.S. 573, at 578 (1980)). To establish the probable

cause necessary for seizure of items in plain view, the officer must demonstrate that the facts available to the officer would warrant a man of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime. *Brown*, *supra*, at 743.

The State's reliance on the plain-view doctrine to circumvent the warrant requirement of the Fourth Amendment is tenuous. As previously mentioned, for the plain-view doctrine to apply, not only must the officer be legitimately in a position to view the object, but it must be immediately apparent to the police that they have evidence before them. *Brown*, *supra*, at 737. In this case, the plain-view doctrine fails for two reasons.

First, the plain-view doctrine requires that an officer be in a position from which he can view a particular area and that he inadvertently notice the object. The officer could not see the scale when the door was slightly ajar and restricted by the chain appended to it. The door was only opened after verbal threats and threats of force were made. Further, even when the door was opened, one of the photos shows a left wall divider which restricts the view of the shelf if a person is outside the hotel room and it is highly questionable that the scale could have been seen outside the hotel room.

Second, the plain-view doctrine requires that an officer must make a lawful initial intrusion. As previously discussed, from their lawful position outside of petitioner's hotel room, the police officers were not able to view any of the illegally seized evidence. It was only once that they had stepped inside the doorway that the officers had a clear view of the closet shelf and dresser. Petitioner did not voluntarily give consent for the police officers to enter his room and therefore they were not lawfully in a position to observe these items in plain-view. The police officers were only able to observe the triple-beam scale and cocaine because of their unlawful activity. Therefore, if counsel had vigorously attacked

the State's evidence and introduced his own, the plain-view exception would have disappeared into thin air.

3. Exigent Circumstances

The final exception to the warrant requirement states that if truly exigent circumstances exist, no warrant is required under general Fourth Amendment principles. *United States v. Karo*, 468 U.S. 705 (1984). Exigent circumstances sufficient to justify warrantless search and seizure refer generally to situations in which law enforcement officers will be unable or unlikely to effectuate arrest, search, or seizure for which probable cause exists, unless they act swiftly, even though they have not obtained prior judicial authorization. *United States v. Gall-Roman*, 816 F.2d 76 (2nd Cir. 1987). The Supreme Court has recognized several such exigent circumstances—hot pursuits of a fleeing felon and the destruction of evidence are two examples. In relying on this exception, however, it is important to recognize that a law enforcement officer must still demonstrate probable cause in conjunction with the exigent circumstances before a warrantless search and seizure is permissible.

The State of New York relied on each of the above exceptions to the warrant requirement of the Fourth Amendment, consent, plain-view, and exigent circumstances to justify its blatantly unlawful search of petitioner's hotel room. Had counsel conducted a meaningful and diligent investigation into the facts surrounding this case, he would have been smacked in the face by the illegality of the State's warrantless search and seizure.

As the preceding discussion indicates, none of the exceptions to the warrant requirement are applicable to the present case. Therefore, in the absence of a warrant and any exceptions to the warrant requirement, the search and seizure of petitioner's hotel room was in violation of the Fourth Amendment and unconstitutional.

III. CRUEL AND UNUSUAL PUNISHMENT

The Eighth Amendment provides that "cruel and unusual punishments [shall not be] inflicted." U.S. Const., Amend. 8.

In *Solem v. Helm*, 463 U.S. 277 (1983), the United States Supreme Court stated that "[this proscription against cruel and unusual punishments] prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed." *Solem*, *supra*, at 284. In accordance with this dictate, a criminal sentence must be proportionate to the crime for which the defendant has been convicted. *Solem*, *supra*, at 290.

"The constitutional principle of proportionality has been recognized explicitly in this Court for almost a century [in determining whether a punishment is cruel and unusual]." *Solem*, *supra*, at 286, and has maintained that

> ". . . a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."

Solem, *supra*, at 292.

In the present case, petitioner was sentenced to a prison term of 15 years to life for possession of six plus ounces of cocaine. The guideline ranges for possession of the same or similar amount of cocaine in Pennsylvania, an "other jurisdiction" under the *Solem* analysis, is from 21 months to 60 months of confinement. *Guideline Ranges for the Controlled Substance Drug, Device, and Cosmetic Act*, 42 Pa. C.S.A. § 9721.

The discrepancy between petitioner's sentence and the Pennsylvania sentence fails the Eighth Amendment's proportionality analysis. Accordingly, petitioner's sentence of fifteen years to life is unconstitutional in that it is cruel and unusual punishment and under the dictates of the Eighth Amendment of the United States Constitution.

CONCLUSION

The torpid, if not supine, efforts of counsel fatally deprived petitioner of his right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution.

The police officer's lack of probable cause, their failure to procure a search warrant, and their subsequent forcible entry into petitioner's hotel room subjected petitioner to an illegal search and seizure contrary to the Fourth and Fourteenth Amendments of the United States Constitution.

The sentence of fifteen years to life imprisonment for the possession of 6 plus ounces of cocaine subjected petitioner to cruel and unusual punishment contrary to the Eighth and Fourteenth Amendments of the United States Constitution.

For the aforementioned reasons, a writ of certiorari should be issued to review the opinion and judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

RAYMOND M. VICTOR
Attorney for Petitioner

APPENDIX A — MANDATE AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED APRIL 22, 1991

MANDATE

Each motion must be accompanied by a supporting affidavit.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 91-2074

ROBERT DATTILO,

Petitioner-Appellant

vs.

ROBERT HOKE,

Superintendent
Respondent-Appellee

NOTICE OF MOTION
for Application for Certificate of Probable Cause

MOTION BY:

RAYMOND M. VICTOR, ESQUIRE
616 DeKalb Street
Norristown, PA 19401
(215) 272-5253
Attorney for Petitioner-Appellant

Appendix A

OPPOSING COUNSEL:

Julie S. Mereson, Esquire
Assistant Attorney General - State of NY
Department of Law - Room 215 - Justice Bldg.
Empire State Plaza
Albany, NY 12224
(513) 474-3654

Has consent of opposing counsel:

A. been sought? No.

B. been obtained? No.

Has service been effected? Yes.

Is oral argument desired? Yes.

Has argument date of appeal been set:

A. by scheduling order? No.

B. by firm date of argument notice? No.

Judge or agency whose order is being appealed:

The Honorable Con. G. Cholakis, Judge of the U.S. District Court, Northern District of NY

Brief statement of the relief requested:

Issuance of Certificate of Probable Cause

Appendix A

s/ Raymond M. Victor
RAYMOND M. VICTOR, ESQUIRE
Appearing for Plaintiff

Date: April 15, 1991

ORDER (Filed August 14, 1991)

IT IS HEREBY ORDERED that the motion be and it hereby is denied and the appeal dismissed.

s/ Roger J. Miner
s/ J.M. Walker
s/ T. McLaughlin

A TRUE COPY
ELAINE B. GOLDSMITH, Clerk
s/ illegible
Chief Deputy Clerk

APPENDIX B — MEMORANDUM DECISON AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK FILED MARCH 28, 1991

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

89-CV-57

ROBERT DATILLO,

Petitioner,

-against-

ROBERT HOKE, Superintendent,

Respondent.

APPEARANCES:

RAYMOND M. VICTOR, ESQ.
Attorney for Petitioner
616 DeKalb Street
Norristown, Pa 19401

ROBERT ABRAMS, ATTORNEY GENERAL
STATE OF NEW YORK
Attorney for Respondent
Department of Law
Capitol
Albany, New York 12224

CON. G. CHOLAKIS, D.J.

Appendix B

OF COUNSEL:

Donald P. Hirshorn, Esq.
Assistant Attorney General

MEMORANDUM DECISION AND ORDER

Petitioner seeks a Certificate of Probable Cause in order to appeal this court's January 28, 1991 denial of a writ of habeas corpus. Pursuant to Federal Rules of Appellate Procedure Rule 22(b), "the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such a certificate should not issue," before the circuit court need consider the case.

Entitlement to the issuance of a certificate of probable cause "requires something more than the absence of frivolity and . . . the standard is a higher one than the 'good faith' requirement of [28 U.S.C.] § 1915." *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). A petitioner must make a "substantial showing of the denial of [a] federal right," *id.*, which entails demonstrating

> that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are "adequate to deserve encouragement to proceed further."

Id. at 893 n.4 (citation omitted) (emphasis in original).

Petitioner's papers underlying his original habeas corpus petition do not reflect a "substantial showing of the denial of [a] federal right". There has been no showing that petitioner was

prejudiced by his attorney's conduct even assuming that his conduct was unreasonable. *See Strickland v. Washington*, 466 U.S. 668 (1984) (test for ineffective assistance of counsel is twofold: a petitioner must show both serious attorney error and prejudice resulting from that error).

There is no showing that there are any issues which are debatable among jurists of reason, or that a court could have resolved the issues differently, or that the questions are adequate to deserve encouragement to proceed further. Furthermore, there is no showing of a substantial denial of a federal right. It is therefore

ORDERED that the application for a certificate of probable cause is denied.

s/ Con. G. Cholakis
CON. G. CHOLAKIS, JUDGE
UNITED STATES DISTRICT
COURT

DATED: Albany, New York
March 27, 1991

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK DATED FEBRUARY 4, 1991

[COPY]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CASE NUMBER: 89-CV-57

ROBERT DATILLO

V.

ROBERT HOKE, Superintentent

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that petitioner's application for a writ of habeas corpus is in all respects denied.

GEORGE A. RAY
Clerk

s/ Mary Ann Francisco
Deputy Clerk

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK FILED JANUARY 28, 1991

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

89-CV-57

ROBERT DATILLO,

Petitioner,

-against-

ROBERT HOKE, Superintendent,

Respondent.

APPEARANCES:

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616 DeKalb Street
Norristown, Pa 19401

ROBERT ABRAMS, ATTORNEY GENERAL
STATE OF NEW YORK
Attorney for Respondent
Department of Law
Capitol
Albany, New York 12224

CON. G. CHOLAKIS, D.J.

Appendix D

OF COUNSEL:

Donald P. Hirshorn, Esq.
Assistant Attorney General

ORDER

This habeas corpus petition pursuant to 28 U.S.C. § 2254 comes before this Court upon the Report-Recommendation of United States Magistrate Judge Gustave J. Di Bianco, dated September 13, 1990 recommending denial of the writ. This Court has carefully reviewed the objections submitted by petitioner's attorney as well as the entire state court record. Although the objections were lengthy, they raised no new substantive issues. The objections were adequately addressed by the well-reasoned Report-Recommendation issued by Magistrate Judge Di Bianco.

Therefore, this Court accepts and adopts the Magistrate Judge's Report-Recommendation, and it is hereby

ORDERED that petitioner's application for a writ of habeas corpus is in all respects denied.

s/ Con. G. Cholakis
CON. G. CHOLAKIS, JUDGE
UNITED STATES DISTRICT
COURT

DATED: Albany, New York
January 28, 1991

APPENDIX E — REPORT-RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK FILED SEPTEMBER 18, 1990

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

89-CV-57

(Judge Cholakis)

ROBERT DATILLO,

Petitioner,

vs.

ROBERT HOKE, Superintendent,

Respondent.

APPEARANCES:

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616 Dekalb Street
Norristown, Pa. 19401

HON. ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondent
The Capitol
Albany, New York 12224

GUSTAVE J. DI BIANCO, Magistrate

Appendix E

OF COUNSEL:

DONALD P. HIRSHORN, ESQ.
Asst. Attorney General

REPORT-RECOMMENDATION

This matter has been referred to the undersigned for Report and Recommendation by the Honorable Con. G. Cholakis by Standing Order dated August 2, 1985.

An Order was issued pursuant to the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. fol. § 2254, ordering the service of the petition. The Order further required the service of an answer by the respondent. The respondent has filed an answer together with the pertinent state court records.[1] The parties orally argued the merits of the petition on February 28, 1990.

The petitioner complains of a judgment of conviction rendered in the Albany County Court on November 4, 1985, after

---

1. Namely, a copy of the indictment; transcripts of the arraignment, substitution of attorney, suppression hearing, adjournment of sentence hearing, trial, People's trial summation, sentencing, and motion to vacate (three volumes); Petitioner's motion to vacate together with the People's reponse; the decision of the County Court with respect to the motion to vacate; the petitioner's notice of appeal to the Appellate Division, Third Department; The Appellate Division's decision granting leave to appeal the petitioner's section 440.10 motion to vacate together with his direct appeal of the conviction; the petitioner's and the People's appellate briefs together with appendices to the Appellate Division; the decision of the Appellate Division affirming both the conviction and the section 440.10 decision,; and the petitioner's application for leave to appeal to the New York Court of Appeals together with the certificate denying leave to appeal.

a jury trial, convicting him of Criminal Possession of a Controlled Substance, First Degree, upon which he was sentenced to a 15 year to life term of imprisonment. After the trial, the petitioner moved to vacate his conviction pursuant to N.Y. Crim. Proc. Law § 440.10. The County Court denied the motion after a hearing. Petitioner appealed both the conviction and the denial of the section 440.10 motion to the Appellate Division, Third Department. The Appellate Division affirmed both proceedings by Order dated July 2, 1987. *People v. Dattilo*, 517 N.Y.S.2d 307 (3d Dep't 1987). The New York Court of Appeals denied leave to appeal on November 12, 1987. *People v. Dattilo*, 70 N.Y.2d 799 (1987).

The petitioner challenges the effectiveness of his trial counsel in the following ways:

> (1) Counsel concocted false testimony and suborned perjury at trial.
>
> (2) Counsel failed to adequately represent the petitioner at the suppression hearing. There was no proper investigation of witnesses who would have corroborated the petitioner's claim that the police coerced their way into the petitioner's room. He failed to allow the petitioner to testify and failed to point out discrepancies in the police officers' testimony.
>
> (3) Counsel did not conduct a responsible investigation of the facts in petitioner's case by failing to interview witnesses or pursue a legitimate trial strategy.

Appendix E

(4) Counsel's efforts to concoct false testimony at the trial and his handling of the case deprived the petitioner of a favorable plea bargain which his previous attorney had negotiated.

Respondent argues for denial of the petition on the merits, claiming that based upon the state court records, the petitioner was competently represented at all stages of the trial. For the following reasons, this court agrees with the respondent and will recommend denial of the petition.

FACTS

1. Trial:

On April 10, 1985, the petitioner was arrested in a Howard Johnson Motel room in Latham New York by two officers of the New York State Police. At the time the petitioner was in possession of almost seven ounces of cocaine. The circumstances surrounding the arrest and the seizure of the contraband were later to be the subjects of a suppression hearing.

The petitioner was originally represented by E. Stewart Jones, Esq. Mr. Jones negotiated a plea bargain for the petitioner which involved pleading guilty to an A-2 Felony instead of the A-1 Felony with which the petitioner was charged. The agreement also included a sentence reduction to 4½ years to life imprisonment rather than the maximum term of 15 years to life.

The petitioner, however, rejected the plea agreement and decided to fire Jones and hire Armand Riccio, Esq. in the hope of getting a better deal. A suppression hearing was held at which Riccio represented the petitioner. The petitioner did not testify,

nor were any witnesses called on his behalf. Riccio relied upon his cross-examination of the People's witnesses for his presentation at the suppression hearing. The court denied the suppression motion, finding that the petitioner consented to the entry by the State Police officers and once the door of the hotel room was opened, contraband was in plain view. The court also found that once the officers saw the drug paraphernalia, they were entitled to walk into the room for safety reasons. Once they entered the room, the drugs were also in plain view.

At trial, the petitioner testified on his own behalf. His testimony at trial implied that he was in possession of the drugs, but that this possession was under duress. He claimed that his brother owed money to a drug dealer and the drug dealer had left Dattilo in the motel room, demanding that Dattilo acquire the $15,000.00 to pay for the drugs in exchange for the $5,000.00 that the brother owed to the drug dealer. Dattilo also claimed that he had made the telephone call to the State Police which alerted the officers to Dattilo's presence in the motel room.

The arresting officers testified for the prosecution.[2] The officer who took the anonymous call also testified. The officers stated that an anonymous call had alerted them to a possible situation involving drugs and the defendant at the Howard Johnson Motel. (TT at 66, 72-73, 218). Two officers went to the motel and asked whether the defendant was registered at the motel. Upon discovering the room number, the officers instructed the manager to accompany them to the room. (TT at 75, 219). The officers knocked on the door and requested that the defendant open the door. (TT at 75, 219). The defendant opened the door

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2. One of the officers testified at the suppression hearing and both officers testified at the trial.

with the chain still attached. (TT at 75-76, 220). The officers identified themselves and told defendant that they were aware that there might be a problem in the room. (TT at 76). With that, the defendant removed the chain from the door and opened the door completely. (TT at 76, 220). It was at that time that the police noticed the triple beam scale, the plastic 'baggies' and the strainer. (TT at 76, 81).

The manager of the motel testified at the trial. He stated that he approached the room with the officers but they asked him to stand approximately fifty feet away for safety reasons. (TT at 214). His testimony corroborated the testimony of the officers with respect to the conversation at the door between the officers and the defendant. (TT at 214-15). The prosecution also called a maid from the Howard Johnson Motel who testified that the person in the motel room did not want anyone entering the room. (TT at 184).

The only other witness for the defendant was his wife Dulcie. Her testimony was that she and the defendant resided in Florida and that on approximately April 7, 1985, the defendant had received a call from his brother. (TT at 252). In response to the telephone call, Mrs. Dattilo testified that the defendant left for New York. (TT at 252). The defense essentially relied upon the defendant's testimony and upon cross-examination of the People's witnesses.

The trial judge instructed the jury on the law and did include an instruction with respect to the affirmative defense of duress. (TT at 345-48). Notwithstanding the defendant's claim of duress, the jury convicted him of Criminal Possession of a Controlled Substance, First Degree.

Appendix E

2. Section 440.10 Motion:

The trial court held a rather lengthy hearing on the petitioner's motion to vacate at which the petitioner's original counsel, E. Stewart Jones, and petitioner's replacement counsel, Armand Riccio testified. The prosecutor presented the testimony of Richard Henness, a paralegal assistant who was working for Mr. Riccio at the time of the petitioner's trial. The petitioner testified on his own behalf. His wife and mother-in-law also testified.

E. Stewart Jones testified that he first spoke with the petitioner's wife and then met with the petitioner at the County Jail. Motion to Vacate-Transcript Volume 1[3] (VT1) at 76. The petitioner gave Mr. Jones a three to four page document, outlining the petitioner's recollection of the events leading to his arrest (VT1 at 76). Jones recalled that petitioner had stated that the police had insisted on entering the hotel room, stated that they did not need a warrant and did not seize the contraband in plain view (VT1 at 78).

Jones stated that at first, he thought that based upon the petitioner's version of the events and the photos that were taken of the room, the chances of success in a suppression hearing were reasonably good (VT1 at 80-81). This was particularly so because the police could not have seen the contraband where the petitioner said that it was located (VT1 at 79). However, Mr. Jones testified that he had a conference with the District Attorney and discovered that there was a variance in the information received from the

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3. The transcript of the Motion to Vacate is in three volumes. The pages will be referred to with the volume number after the abbreviated reference VT, ie. VT1.

petitioner and the facts of the search as stated by the officers (VT1 at 82). It was at this point that Jones changed his mind about the chances of success at a suppression hearing and counseled his client to plead guilty (VT1 at 88-89). Jones testified that petitioner "became very emotional" and "was not interested in doing four and a half years" (VT1 at 82). Petitioner asked attorney Jones to attempt to obtain a plea bargain with a sentence of three years which Jones explored (VT1 at 83). Jones learned that the "similar" case with a three year sentence had "distinguishing" facts which made the sentence three years. Petitioner told Jones that "he might consider three years" but never indicated any willingness "to do four and a half" (VT1 at 84). Jones stated he was told by the petitioner at their last meeting that "in view of the difference that [they] had over what [petitioner] should do, . . . he felt he should get new counsel" (VT1 at 91).

Jones specifically said that the petitioner never seemed interested in taking the plea of four and one half to life imprisonment (VT1 at 84-85). Jones's first impression was that the petitioner was not going to take the plea (VT1 at 85).

Petitioner testified that he was aware that another individual in the County Jail was able to negotiate a plea of three and one half years to life imprisonment and petitioner stated that he wanted to find out if he could get a better bargain with another attorney (VT1 at 8). The petitioner stated that when Riccio came to see him, Riccio stated that four and one half years to life was 'insanity' and that Riccio could get him acquitted (VT1 at 9).

Essentially, the petitioner claimed that Riccio had not only induced him to reject the plea with Riccio's assurances of acquittal, but also encouraged petitioner to lie on the stand at the trial in

order to support Riccio's concocted defense of duress (VT1 at 11, 17, 19-20, 28). Dattilo stated that Riccio told him that Riccio was going to wrap his 'scenario' around the testimony which was elicited at the suppression hearing (VT1 at 13).

The petitioner's wife testified that she had a conversation with Mr. Riccio when she went to Riccio's office in order to hire him to represent the petitioner (VT2 at 5). She stated that Riccio told her that the petitioner might have to lie in his own defense because the police "lie like sons of bitches" (VT2 at 7-I 8). She also testified that she told Riccio that she could not get on the stand and lie (VT2 at 10). Counsel for petitioner asked Mrs. Dattilo why she would think that Riccio wanted her to lie (VT2 at 10). She responded that it was because Riccio was asking the petitioner to lie (VT2 at 10). On cross-examination, however, Mrs. Dattilo testified that Riccio never actually told her that she would have to lie (VT2 at 20).

Petitioner's mother-in-law also testified to the fact that Riccio told both her and Mrs. Dattilo that the petitioner would have to lie (VT at 32). Petitioner's mother-in-law also stated that Riccio stated that he was not afraid to "buck the system", which she interpreted to mean "go outside the law" (VT2 at 32-33). She testified that Riccio stated that there was no need to worry because he had friends downtown that owed him favors, namely, the District Attorney and the Judge (VT2 at 34). The essence of her testimony was that from all that Riccio said, she interpreted that Riccio wanted the petitioner to lie on the stand (VT2 at 47-49).

The prosecutor called Armand Riccio to testify. Essentially, Mr. Riccio stated that he never told anyone to lie. In fact, Riccio stated that he told the petitioner that the plea negotiated by Mr. Jones was a very favorable bargain and that Riccio probably would

not be able to get the same deal (VT2 at 60).

Riccio stated that Dattilo had called him several times over a period of approximately ten to fourteen days (VT2 at 55). Finally, Riccio went to see the petitioner at the County Jail, but stated that he did not discuss any substantive matters with respect to the charge because, at the time, the petitioner was still represented by Mr. Jones (VT2 at 56-57). Riccio stated that he was later retained by petitioner's family and Riccio had a conversation with Mrs. Dattilo and her mother at Riccio's office (VT2 at 65).

During this conversation, Riccio stated that his method of criminal defense was to "sit back and wait" and develop a defense based upon the factual "scenario" that developed at trial (VT2 at 66). He stated that what he meant was that "the facts might indicate the availability of a defense." (VT2 at 66). He also stated that Mrs. Dattilo asked him why Mr. Jones would have had a change of heart with respect to the petitioner's chances at the suppression hearing and Riccio stated that he told Mrs. Dattilo that Jones was a very "cautious and deliberate attorney" who might prefer to compromise rather than take a chance on a trial (VT2 at 67-68).

Riccio testified that it was after the suppression hearing had been concluded that Dattilo told Riccio the story about being forced to possess the cocaine out of fear for what an individual named Brad King would do to Dattilo's brother (VT2 at 79-80). Riccio stated that after the suppression hearing, the petitioner was very downhearted and that Riccio suggested that he might try to renew the plea bargain (VT2 at 80). Riccio stated that the petitioner was not "too keen" on that (VT2 at 80).

It was at this time, in the presence of Riccio's paralegal

assistant (Richard Henness) that Dattilo stated that it was time "[he] told the truth." (VT2 at 80). Riccio stated that although the petitioner never used the word duress, he had recited the classic situation which would fall into the duress defense. (VT2 at 81).

Riccio also stated that he was concerned about this change of story, but the police had testified at the suppression hearing that when they first got the telephone call, they were concerned that there was a "hostage situation" in the hotel room. (VT2 at 83). Riccio interpreted this to be consistent with the petitioner's new story that he essentially was forced to be in possession of the cocaine. (VT2 at 82-83). Riccio stated that he told the petitioner that Riccio had some problems in this area and that if Riccio were to continue on the case, the petitioner would have to get on the stand and testify to the facts as he was now stating them. (VT2 at 82).

Riccio met again with Dattilo and Dattilo elaborated on the story that he told after the suppression hearing. (VT2 at 84). Riccio and Dattilo had a discussion about the anonymous telephone call. (VT2 at 84). Riccio stated that he told Dattilo that if he were lying, he would "sink or swim on the witness stand." (VT2 at 86). Riccio maintained that he never told Dattilo to lie. (VT2 at 85).

With respect to the conversation that Riccio had with the petitioner's wife and mother-in-law, Riccio stated that he did tell them that he would see which available defense fit the factual 'scenario' that developed. (VT2 at 110). He also told Dattilo's family that Riccio was not sure that Dattilo was telling him everything, so that Riccio might have to rely upon what he was able to develop on his own. (VT2 at 111). Riccio also stated that the police had a tendency to equivocate and not give direct answers, that the oath was no guarantee that they were telling the truth,

and that the truth had to be "developed". (VT2 at 112-13).

Riccio stated that Dattilo insisted that Riccio speak to Dattilo's wife in regard to the telephone call from petitioner's brother while petitioner was in Florida. (VT2 at 127). When Riccio spoke with Mrs. Dattilo about the call, she stated that she did not remember such a call and would not lie for anyone. (VT2 at 128). Riccio also stated that the petitioner asked him whether Riccio thought that the judge would consider dismissing the criminal case in exchange for the petitioner not bringing suit if the petitioner "stage[d] an accident", fell and hurt himself in the courthouse. (VT2 at 129).

Richard Henness also testified for the prosecution. He stated that he was present in the room with the petitioner and Riccio after the suppression hearing. (VT2 at 158). Henness stated that the petitioner told Riccio that "[w]ell, after this is all over, . . . I'll tell you what really happened." (VT2 at 158). Henness stated that Riccio was stunned that the petitioner was telling him facts that were inconsistent with what he had originally told Riccio. (VT2 at 159, 160). Henness also remembered Dattilo mentioning the $5,000.00 or $15,000.00 that Dattilo stated that he was supposed to acquire for Brad King in order to pay off Dattilo's brother's debt. (VT2 at 160).

The County Court held that the petitioner had not sustained his burden to show that the conviction should be vacated. The court found Henness's testimony to be credible because he was essentially the only witness with no interest in the outcome of the hearing and he testified in a manner that would not indicate coaching. The court went on to state that even if Riccio had participated in the perjury, the petitioner suffered no harm as a result of the attorney's actions. The court stated that this was

not a case of inadequacy but of trial strategy, whether conceived personally by the petitioner or with the help of counsel.

The Appellate Division affirmed the County Court, finding that Henness was credible and that the decision to mount a duress defense was one of trial strategy, albeit unsuccessful. The Appellate Division also stated that although the defense seemed to be predicated on the petitioner's perjury, this alone did not render the assistance ineffective.

DISCUSSION

1. Effective Assistance of Counsel:

In order to succeed on a claim of ineffective assistance of counsel, a petitioner must establish both serious attorney error and prejudice resulting from that error. *Strickland v. Washington*, 466 U.S. 668 (1984). In order to show serious error, the petitioner must establish that counsel's representation fell below an objective standard of reasonableness. *Id.* at 690. The prejudice component of the analysis must be established by showing that but for the serious errors by counsel, the result of the proceedings would have been different. *Id.* at 694.

The Supreme Court has also held that the breach of an ethical standard by counsel does not necessarily indicate that counsel rendered ineffective assistance. *Nix v. Whiteside*, 475 U.S.157, 165-66 (1986). Instead, counsel's behavior is a factor to be considered in determining whether the performance fell below an objective standard of reasonableness. *McDougall v. Rice*, 685 F. Supp. 532, 543 (W.D.N.C. 1988).

A strong presumption exists that counsel's conduct did fall

within the range of reasonable assistance under the circumstances. *Strickland*, 466 U.S. at 689. In this respect, the court would point out that whether a decision is reasonable, may be determined or influenced by the defendant's own actions or by his statements to counsel. *Johnson v. Cabana*, 805 F.2d 579, 581 (5th Cir. 1986)(citing *Strickland*, 466 U.S. at 691). Finally, a defendant's own insistance on a particular defense or trial strategy must generally be followed *See e.g., Lowenfeld v. Phelps*, 817 F.2d 285, 292 (5th Cir. 1987)(citing *Autry v. McKaskle*, 727 F.2d 358, 361 (5th Cir. 1984)).

Additionally, where the state court has held a hearing on an issue, its findings of historical fact are entitled to a presumption of correctness on habeas review unless one of the exceptions listed in section 2254(d) applies. 28 U.S.C. § 2254(d); *Sumner v. Mata*, 449 U.S. 539, 547 (1981); *Cruz v. Alexander*, 708 F.2d 31 (2d Cir. 1983). The federal court's review of such findings is limited to whether they are fairly supported by the record as a whole. *See Harmon v. Ryan*, 657 F. Supp. 623, 625 (M.D. Pa. 1986)(citing *Smith v. Zimmerman*, 768 F.2d 69 (3d Cir. 1985)). The presumption applies whether the facts are found by a trial or appellate court. *Boulder v. Armontrout*, 713 F. Supp. 1558, 1570 (W.D. Mo. 1989)(citing 28 U.S.C. § 2254; *Sumner, supra*).

Questions of law, however as well as mixed questions of law and fact do not enjoy the presumption of correctness and are fully reviewable by the federal court. *See Brooks v. Zimmerman*, 712 F. Supp. 496, 499 (W.D. Pa. 1989)(citations omitted). With respect to a claim of ineffective counsel, the ultimate question of whether counsel's performance was deficient is a mixed question of law and fact, but state court findings of fact in the course of deciding such a claim are subject to the presumption. *Loyd v. Smith*, 899 F.2d 1416, 1425 (5th Cir. 1990).

Appendix E

With the above standard in mind, the court will turn to an analysis of the claims against petitioner's counsel in the instant case.

A. Loss of a Favorable Plea Bargain:

The petitioner argues that Riccio's false guarantee of acquittal and his failure to investigate the facts of the search and seizure caused the petitioner to give up a favorable plea bargain negotiated by Mr. Jones.

As stated above, the petitioner must not only show that his attorney's performance was deficient, but that but for the deficiency, the proceedings would have had a different result. *Strickland, supra.* A review of the transcript of the section 440.10 hearing shows that the petitioner had never indicated to Mr. Jones that he was interested in accepting the plea bargain of four and one half to life imprisonment. Mr. Jones specifically testified that it was his impression that the petitioner was not interested in taking the plea offer, and asked about a better offer. (VT1 at 82-85). Although it is true that Dattilo had spoken to Riccio before he discharged Jones, it appears that Dattilo had decided not to take the plea from the time that it was proposed to him by Jones. (VT1 at 82).

It was neither Riccio's guarantee of acquittal nor any action by Riccio that dissuaded the petitioner from taking the plea. Petitioner has not shown that the rejection of the plea which resulted in a greater sentence upon conviction was caused by any action ineffective or otherwise of Riccio. Thus, this claim of ineffective counsel must fail.

Appendix E

B. Ineffectiveness at Suppression Hearing:

Petitioner argues that counsel was ineffective because he failed to investigate the facts surrounding the search for and seizure of the drugs and drug paraphernalia found in the petitioner's hotel room. The petitioner cites many deficiencies of counsel, including the failure to call witnesses, and the failure to use the photographs of the hotel room taken by Mr. Jones's investigator.

The court finds that even assuming that counsel's errors were unreasonable, the petitioner can show no prejudice as a result of any deficiencies of counsel. Essentially, the suppression issue was a credibility determination between what the state troopers claimed and what the petitioner argued. The photographs taken by the investigator would not have added anything to the petitioner's presentation. The state troopers testified that the drugs and paraphernalia were in plain view and the petitioner claimed that the objects were hidden and the police forced their way into the room. There was no issue regarding the layout of the hotel room that would have made the photographs support the petitioner's version of the events.

As for witnesses, the only other individual present at the time of the search and seizure was the manager of the hotel who was told to stand approximately fifty feet away. Although the manager did not testify at the suppression hearing, he did testify at the trial, so the court can determine from that testimony whether he would have helped the petitioner.

The manager, Mr. Howland, testified that he was told by the officers to wait down the hall, one of the officers drew his gun and they knocked on the door. (TT at 214-15). While the police were knocking on the door, they asked if the petitioner

would open it. The door opened as far as the chain would allow, and the officers stated "Please open the door. We are police officers" (TT at 214-15). Mr. Howland then testified that in response, the door closed and opened again fully and the police entered. *Id.* This testimony does not support the theory of a forced entry, but instead supports the troopers' claim that the petitioner consented to the entry. Thus, the failure to call the manager at the suppression hearing was not unreasonable and did not cause the petitioner prejudice.

The only avenue open to defense counsel was to cross-examine the trooper[4] to determine any discrepancies in his story. This was done by counsel. Riccio established that no search warrant had been obtained. Suppression Hearing Transcript (SH) at 21-22. He questioned the trooper with respect to whether his gun was drawn in order to attempt to negate the allegation of consent.[5] (SH at 24). Riccio also inquired into the anonymous telephone call that was made to the State Police and determined that the equipment that usually recorded the telephone calls was not working. (ST at 30-31). Given the trooper's testimony, there was not much else that the petitioner could do. Counsel did waive

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4. Only one of the troopers testified at the suppression hearing.

5. The court would note that trooper wilson testified at the suppression hearing that his gun was not drawn and that he did not recall that trooper Cook's gun was drawn. (SH at 24). This statement with respect to Cook's gun was incorrect, since officer Cook testified at the trial that he did draw his gun. (TT at 220). However, even this inconsistency would not have helped petitioner at the suppression hearing because Cook testified at the trial that he drew his gun but kept it at his side. (TT at 220). Cook was positioned to the left of officer Wilson when Wilson knocked at the door and petitioner may not have initially seen Cook or the gun when he opened the door with the chain attached before he opened the door fully.

closing argument and perhaps it might have been better to sum up the argument that he was trying to make[6], however, the fact that representation could have been better does not make it ineffective per se.

The court would point out that the petitioner's first attorney had serious doubts about the chances of success at the suppression hearing. That was one of the reasons that Jones had attempted to negotiate a plea bargain for the petitioner. At the hearing on the motion to vacate, it became clear that after some discovery and discussion with the District Attorney, the facts indicated that the search and seizure did not occur as the petitioner had originally claimed. The loss of the suppression hearing was not due to Riccio's unreasonable actions, but due to the weakness of the facts in the petitioner's favor. Thus, the petitioner has not shown that Riccio did not afford effective assistance at the suppression hearing. It was the petitioner who did not want to take Jones's negotiated plea agreement and instead chose to go to trial. As stated above, these types of decisions must generally be followed by counsel. *Lowenfeld*, 817 F.2d at 285.

C. Suborning Perjury:

The petitioner also claims that Riccio was ineffective because he counseled the petitioner to lie at the trial. After the motion to vacate, the trial court found the Henness testimony credible and supportive of the proposition that the petitioner's trial testimony was "self-concocted." Decision on Motion to Vacate

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6. Riccio's testimony was that his technique of defending cases was to "sit back and wait" to utilize defenses based on developments at trial. (VT2 at 66). Failure to make a closing argument may have been a tactical decision.

at p.3. Although the court found that the petitioner created his own lie, the court made additional findings because of the "bizarre" course of the case. Id. The court went on to state that the petitioner had suffered no "redressable harm" whether he himself had concocted the story or whether the attorney had willingly assisted him in the lie. *Id.* at 5.

The Appellate Division affirmed both the conviction and the decision on the motion to vacate. The Appellate Division concurred in the trial court's finding with respect to Henness's testimony about Riccio being "stunned" after the suppression hearing when Dattilo told Riccio the story about being forced to possess the drugs under duress. The court also stated although there may have been a more advantageous defense, Riccio crossexamined the prosecution's witnesses and attempted to present the evidence consistent with the petitioner's proposed defense. The court concluded by saying that the fact that the defense was based upon perjured testimony did not necessarily indicate that the representation was ineffective.

This court cannot reassess the credibility of the witnesses that testified at the hearing on the motion to vacate, and if the state court found that Mr. Henness was testifying truthfully, this factual finding is not reviewable unless it is not supported by the record. *Sumner v. Mata, supra.* There is no evidence that Mr. Henness was not testifying truthfully. Henness's testimony indicates that the petitioner did tell Riccio a different story after the suppression hearing than he had originally recounted. Clearly, at that time it was too late to take the original plea. Riccio was then faced with a new set of facts with which to go to trial.

It is true that the fact that Riccio was "stunned" after the suppression hearing does not automatically mean that he did not

participate in a later deception of the court, although it does indicate that Riccio did not come up with the concocted defense and request the defendant to present such testimony at trial. Rather it is more consistent with the theory that the petitioner told Riccio the story about being forced to possess the drugs and Riccio stating that if this were the case, the only person who could testify to that fact would be the petitioner himself.

In any event, the Supreme Court in *Nix v. Whiteside* specifically stated that the breach of an ethical standard does not automatically lead to ineffective counsel. 475 U.S. at 165. While suborning perjury is more than a simple ethical breach, and would be considered unreasonable conduct by an attorney, the *Strickland* inquiry focuses on whether the unreasonable conduct caused prejudice to the defendant. *Strickland*, 466 U.S. at 694.

Given the evidence against the petitioner and the loss of the suppression hearing, it is unlikely that any testimony would have helped the petitioner achieve an acquittal. In fact, if the petitioner testified truthfully, he would have been convicted even sooner. The state trial court made the same observation in its decision on the motion to vacate the conviction. County Court Decision at 5. Although in a different context, the court in *Nix* stated that "when defendants testify, they must testify truthfully or suffer the consequences." 475 U.S. at 174 (quoting *United States v. Havens*, 446 U.S. 620, 626 (1980).

This court does not in any way condone any actions taken or alleged to have been taken by Mr. Riccio, although the state court's main holding was that Mr. Riccio did not participate in the perjury. At worst, Mr. Riccio could have been suspicious that the petitioner was not telling the truth when petitioner changed his story after the loss of the suppression hearing. Petitioner's

counsel argues that Riccio's past conduct should be probative on the issue of whether he concocted the story told by the petitioner. This court, however, agrees with the state court that Riccio's prior actions should not be used to prove that he acted in conformity with those actions in the petitioner's case.

Therefore, based on the factual findings of the state courts, this court's review of the legal issues and mixed questions of law and fact lead to the conclusion the the petitioner has not shown that his counsel was constitutionally ineffective.

WHEREFORE, based on the findings in the above Report, it is

RECOMMENDED, that the petition be denied and dismissed.

Pursuant to 28 U.S.C. § 636(b)(1), the parties have ten days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. FAILURE TO OBJECT TO THIS REPORT WITHIN TEN DAYS WILL PRECLUDE APPELLATE REVIEW. *Small v. Secretary of Health and Human Services*, 892 f.2d 15 (2d Cir. 1989);28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a), 6(e), and it is further

ORDERED, that the state court records herein be returned directly to the office of the Assistant Attorney General at the conclusion of these proceedings. He has agreed to make them available for any appellate review. (The petitioner in this action has also provided copies of state court records which may be returned to petitioner's counsel at the conclusion of the proceedings).

Appendix E

s/ illegible
United States Magistrate

Dated: September 13, 1990
Syracuse, New York